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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958

No. 944

HERSHEY MFG. CO., an Illinois Corporation,
Appellant,

vs.

BENJAMIN S. ADAMOWSKI, individually and as State's Attorney of Cook County; **JOSEPH D. LOHMAN**, individually and as Sheriff of Cook County; **TIMOTHY J. O'CONNOR**, individually and as Commissioner of Police of the City of Chicago; **WILLIAM G. MILOTA**, individually and as Bailiff of the Municipal Court of the City of Chicago; and **LATHAM CASTLE**, Attorney General of the State of Illinois,
Appellees.

On Appeal from the United States District Court For the Northern District of Illinois.

Jurisdictional Statement

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Appellees.

On Appeal from the United States District Court For the Northern District of Illinois.

Jurisdictional Statement

Appellant appeals from the final order of a United States District Court of three judges for the Northern District of Illinois, entered on February 9, 1959, granting the motion to dismiss, dissolving the temporary injunction

and dismissing the cause, and the order denying the motion to vacate and other relief* entered on April 14, 1959, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW.

The opinion of the District Court for the Northern District of Illinois, Eastern Division is not yet reported. Copies of the memorandum and order and dissenting opinion, are attached hereto as Appendix A, *infra*, p. 1a, 9a.

JURISDICTION.

This suit was brought under 28 U.S.C., §1331, to restrain the enforcement of a statute of the State of Illinois entitled "An Act to Protect All Counties in the State of Illinois in which there are United States Naval Stations and Military Posts of the First Class from Slot Machines and Other Gambling Devices" (Ill. Rev. Stat. Ch. 38, §344 *et seq.*) on the ground that such statute as applied to plaintiff's business of manufacturing parts and subassemblies of slot machines for shipment in interstate and foreign commerce in compliance with the Johnson Act, Title 15 U.S.C., §1171 *et seq.* is repugnant to the Commerce and Supremacy clauses of the Constitution of the United States and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States. The order of the district court dismissing the complaint was entered on February 9, 1959. A motion to vacate such order was denied on April 14, 1959 and notice of appeal

* On February 17, 1959 the court had granted the prayer for a temporary injunction and enjoined enforcement of the challenged statute until further order of the court.

was filed in that court on April 20, 1959. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C., §§1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Doud v. *Hodge*, 350 U.S. 485; *Hines* v. *Davidowitz*, 312 U.S. 52; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55; *Valentine* v. *Great Atlantic & Pacific Tea Co.*, 299 U.S. 32; *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550; *Sterling* v. *Constantine, et al.*, 287 U.S. 378; *Railroad Commission of California* v. *Los Angeles Railway Corp.*, 280 U.S. 145; *Fidelity & Deposit Co. of Maryland* v. *Tafoya*, 270 U.S. 426; *Michigan Public Utilities Commission* v. *Duke*, 266 U.S. 570; *Pacific Telephone & Telegraph Co.* v. *Kuykendahl*, 265 U.S. 196; *Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U.S. 271; *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S. 290; *So. Covington, etc. Ry. Co.* v. *Newport*, 259 U.S. 97; *Lee* v. *Rickle*, 292 U.S. 415.

QUESTIONS PRESENTED.

1. Did the district court have jurisdiction under Title 28 U.S.C., Sec. 1331 of this suit involving the requisite jurisdictional amount and substantial federal questions?

2. Is a substantial federal question under the Commerce and Supremacy clauses of the Constitution presented by a complaint seeking to enjoin the enforcement of a state statute prohibiting the manufacture of gambling devices in a county in the state "in which there is a United States Military Post or United States Naval Training Station of the First Class" by seizure from a shipment to a state in which their assembly and use is lawful and from

a factory, of parts and subassemblies of gambling devices, manufactured for sale in interstate and foreign commerce and sold and labeled in compliance with the Johnson Act, T. 15 U.S.C., 1171 *et seq.*?

3. Is a substantial federal question under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution presented by an attack upon a state statute the legislative history and substance of which show that the state legislature did not intend to prohibit all manufacture of certain items, but only their manufacture in counties having military establishments "of the first class" (a) when such classification is not defined in the statute nor in any other statute, has no common law meaning and has not been previously judicially construed; and (b) when such classification has no reasonable basis or relationship to the protection of the health, safety or morals of the public?

4. In this suit seeking to enjoin actions under a state statute the constitutionality of which was expressly placed in issue by the complaint and responsive pleadings labeled "motion to dismiss" was there an issue for a three judge court under Sections 2281 and 2284, Title 28, U.S.C.?

5. Can a district court of three judges properly dismiss on motion for want of jurisdiction a suit, involving the necessary jurisdictional amount, to enjoin acts interfering with interstate commerce which the court has found "properly enjoinable if proved"?

6. Does a dist[illegible]urt of three judges lack jurisdiction to determine th[illegible]itutionality of a state statute which "may seem to [illegible]e the due process clause of the Fourteenth Amendment of the United States Constitution" because the state Supreme Court "has not yet so interpreted it"?

7. Does a district court of three judges lack authority to enjoin the enforcement as to plaintiff of a statute which, as actually applied to plaintiff by state enforcement officers, deprives it of due process of law and equal protection of the laws?

8. If the district court did have jurisdiction and if the case was one for the application of the so-called doctrine of "discretionary abstention" was it proper for the district court to dismiss the complaint?

9. Did the complaint as amended allege sufficient facts to show the danger of immediate and irreparable injury to plaintiff?

STATUTES INVOLVED.

The statutes involved are "An Act to Protect All Counties in the State of Illinois in which there are United States Naval Stations and Military Posts of the First Class from Slot Machines and Other Gambling Devices" (Ill. Rev. Stat. Ch. 38, §344 *et seq.*); and the Johnson Act, 15 U.S.C. §§1171 *et seq.*, T. 28 U.S.C. §§1331 and 2281. These statutes are set forth in full in Appendix B hereto.

STATEMENT.

Appellant, an Illinois corporation, on July 14, 1958 filed its complaint in the United States District Court for the Northern District of Illinois invoking the jurisdiction of that court under Title 28 U.S.C. § 1331. The cause was assigned to the calendar of Judge Campbell.

The complaint alleged that in addition to manufacturing camera accessories, and milk, soft drink and bread dispensers, plaintiff, with approximately $500,000 of tools, dies and plans, manufactures and ships in interstate commerce in compliance with the Johnson Act, parts and subassemblies of coin operated devices, defined as gambling devices or slot machines; that the challenged statute, adopted in 1919, was never interpreted and enforced as affecting the interstate manufacture and shipment of slot machine parts and subassemblies, in which plaintiff engages, until the recent actions sought to be enjoined. These were: the seizure from Transworld Airlines of 31 parcels of slot machine subassemblies and parts which are plaintiff's property, in the course of interstate commerce from Illinois to Nevada, in complete compliance with the Johnson Act; the seizure of parts, subassemblies, papers and shipping stencils from plaintiff's factory, and threats to seize and destroy property of plaintiff and its customers in interstate commerce and to continue and repeat the depredations against and interference with the property and bus-

iness of plaintiff in interstate commerce, thereby causing substantial and irreparable loss and damage to plaintiff and its employees, compelling it to cease the manufacture and interstate shipment of such merchandise.

The complaint alleged that said statute, entitled "An Act to Protect all Counties in the State of Illinois in which there are United States Naval Stations and Military Posts of the First Class from Slot Machines and other Gambling Devices" (Ill. Rev. Stat. Ch. 38, §344 *et seq.*) is invalid and in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that on its face it is vague and uncertain so that persons affected by it cannot determine in what counties it would apply nor what conduct would be violative of its provisions and that the challenged statute as applied to plaintiff is an attempt by the State of Illinois to legislate in a field which has been pre-empted by Congress by enactment of the Johnson Act, 15 U.S.C. §1171 *et seq.*, and, therefore, contrary to the Commerce and Supremacy clauses of the Constitution.

When the complaint was filed on July 14, 1958 application for a temporary restraining order was made to Judge Perry, sitting in the summer vacation as emergency motion judge. After hearing evidence and arguments on July 25th and July 28th, 1958, and finding that irreparable damage would otherwise result, Judge Perry entered a temporary restraining order pursuant to Title 28 U.S.C. §2284(3).

The motion to dismiss filed by defendant Adamowski on July 25, 1958 sought dismissal on the ground, among others, that application had not been made for a court of three judges. However, Judge Perry, upon examination of the complaint, had already requested the chief judge of the circuit to appoint three judges.

On July 31, 1958 the chief judge designated Circuit Judge Schnackenberg and District Judge Hoffman to sit with Judge Campbell, to whom the case had been assigned.* On September 29, 1958 the court convened, heard arguments on the motions to dismiss and continued in force the temporary restraining order.

On February 9, 1959 the court granted the motions to dismiss, dissolved the temporary restraining order and dismissed the cause at appellant's costs, the circuit judge dissenting.

In a memorandum prepared by a majority of the court it was said that the allegations as to seizures of appellant's property in interstate commerce brought the case within the jurisdiction of a single district judge but that jurisdiction of the "Three Judge Court" was lacking, that interpretation of the challenged statute as well as another Illinois statute, the Act of 1895, Ch. 38, Ill. Rev. Stat., § 341, *et seq.* was involved, that the Illinois Supreme Court has not interpreted the challenged statute as denying due process of law, that the doctrine of "discretionary abstention "should be exercised here by the dismissal of a complaint which asks a decision on the merits concerning unresolved questions of state law and questions of Constitutional law never before decided by the State Supreme Court"; that the complaint does not present a "substantial Constitutional claim"; that, therefore, the "Three Judge Court" was without jurisdiction. The court held that even if it had jurisdiction the complaint does not show the danger of immediate and irreparable harm and that the plaintiff has "many adequate remedies at law".

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* *Cf., Two Guys from Harrison—Allentown, Pennsylvania, Inc.* v. *McGinley* (3rd Circuit)—F. 2d—Mar. 25, 1959, as amended April 20, 1959.

Circuit Judge Schnackenberg, dissenting, stated that the majority opinion undoubtedly overlooked the language of this Court in *Doud* v. *Hodge*, 350 U.S. 485:

> "It is clear that the District Court had jurisdiction to entertain appellant's complaint by virtue of the authority vested in it by 28 U.S.C., §§ 2281 and 2284. This Court has never held that a district court is without jurisdiction to entertain a prayer for an injunction restraining the enforcement of a state statute on grounds of alleged repugnancy to the federal Constitution simply because the state courts had not yet rendered a clear or definitive decision as to the meaning or federal constitutionality of the statute."

Thereafter, on February 17, 1959 the court entertained a timely motion to vacate the order of dismissal and for other relief including a permanent injunction to restrain defendants from enforcing the challenged statute against appellant, and pending action on the motion, enjoined the defendants from enforcing the challenged statute against appellant until further order of the court. After further argument, on April 14, 1959, the motion to vacate the order of dismissal was denied.

During argument of the motion to vacate Judge Hoffman indicated his view that in the absence of state court interpretation and construction of the challenged statute the district court is without jurisdiction. The two district judges, the circuit judge dissenting, denied an application for a temporary injunction pending determination of this case on appeal, holding that the previous orders of the court had been without authority.

THE QUESTIONS ARE SUBSTANTIAL.

The first, sixth, seventh and eighth questions involved in this appeal are similar to those thought to have been settled in *Doud* v. *Hodge*, 350 U.S. 485. In the *Doud* case this Court stated that it had "never held that a district court is without jurisdiction to entertain a prayer for an injunction restraining the enforcement of a state statute on grounds of alleged repugnancy to the federal Constitution simply because the state court had not yet rendered a clear or definitive decision as to the meaning or federal constitutionality of the statute." The Circuit judge states correctly, we believe, that the decision of this Court in *Doud* v. *Hodge* is applicable.

All that appellant seeks in this case is to restrain the enforcement of the challenged statute insofar as it is applied to appellant's business of manufacturing parts and subassemblies of so-called slot machines for shipment and delivery in commerce in compliance with the Johnson Act, Title 15 U.S.C. §§1171 *et seq.* State officers have actually acted pursuant to the state statute against appellant's property and business both before and since the judgment below, and have threatened to and continue to enforce such statute and their action unless restrained does prevent appellant from engaging in its business. Even if the challenged statute, the enforcement of which is sought to be enjoined on the ground of its unconstitutionality, were found not to apply to appellant's business, the actual interference and threatened future interference with appellant's business pursuant to such statute is unlawful and subject to restraint by a federal court of equity of three judges. *Lee* v. *Bickle*, 292 U.S. 415; *Modern Woodmen of America* v. *Casados*, 15 Fed. Supp. 483; *United Airlines* v. *Public Utilities Comm.*, 109 Fed. Supp. 13.

It is believed that there is a special problem in the United States District Court for the Northern District of Illinois concerning the jurisdiction of that court to entertain a prayer for an injunction to restrain enforcement of a state statute on the ground of its alleged repugnancy to the federal constitution in the absence of prior consideration of such state statute by the Supreme Court of Illinois. The problem is aggravated by the insistence of the Attorney General of Illinois and the State's Attorney of Cook County, Illinois, to whose views great weight should ordinarily be given, that the District Court in such circumstances is without "original" jurisdiction. Under these special circumstances this question of jurisdiction needs to be passed upon again by this Court.

2. It appears from the memorandum of the court below that it regards a "Three Judge Court" as a court of special jurisdiction, separate and apart from the district court. Thus in its view, relying upon the Court of Appeals decision in *Cloverleaf Butter Co.* v. *Patterson*, 116 Fed. 2d 227*, the complaint presented a federal question for a single district judge which if proved, is properly enjoinable, but that such question is not cognizable by the "Three Judge Court" which regardless of the relief sought, is understood to have jurisdiction only if the substantial federal questions necessarily decided are constitutional questions.

"In our view a district court of three judges has jurisdiction coextensive with that of a district court of one judge, with the important difference that the single judge may not grant an interlocutory or permanent injunction restraining the enforcement of a state statute upon the ground of its unconstitutionality; a court of three judges

* Reversed by this Court in 315 U.S. 148.

is properly convened whenever such relief is sought. The statute, of course, limits the authority of a single district judge but not that of a court of three judges properly constituted and convened. *Fisher* v. *Brucker*, 41 Fed. 2d 774; *Modern Woodmen of America* v. *Casados*, 15 Fed. Supp. 483; *United Airlines* v. *Public Utilities Comm.*, 109 Fed. Supp. 13.

It is believed that the administration of justice in the Northern District of Illinois requires a clear exposition by this Court of the jurisdiction of a district court of three judges.

3. While the court below dismissed the cause for want of jurisdiction for the stated reason that the challenged statute had not been previously considered by the Supreme Court of Illinois,* which is believed to be an erroneous reason, its jurisdiction does depend upon there being substantial federal questions presented, since diversity of citizenship is not present.

The several questions presented by the complaint are believed to be substantial and important.

The challenged statute prohibiting the manufacture of slot machines in counties having military establishments "of the first class" is believed to violate the due process and equal protection clause of the Fourteenth Amendment. The phrase "of the first class" is not defined in the statute, has not been given previous judicial construction, has no other statutory meaning and has no common law meaning.

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* To our knowledge, the only Illinois Court to pass on the challenged statute heretofore was the County Court of Lake County, Illinois in **People v. Korwin**, Number 12552. Hulse, J. held that the words "of the first class" had no meaning and that the statute was therefore unconstitutionally vague. No appeal was taken by the State.

When the bill for such Act was originally introduced in the Fifty-first General Assembly in Illinois in 1919 as Senate Bill 161 it carried a paragraph as follows: "Definition: A military post or naval station of the first class shall mean one in which there is at the time of the passing of the Act accommodation for 25,000 soldiers or apprentice seamen." Such definition was stricken before the passage of the Senate bill in the House.

The challenged statute appears to us to be unconstitutionally vague. *Connally* v. *General Construction Co.*, 269 U. S. 385, 391-392.

It is also believed that the challenged statute offends the due process clause of the Fourteenth Amendment in that it fails to provide for any notice, hearing or judicial determination as to whether a particular machine seized pursuant to it is one proscribed. The State's Attorney represented to the court below that he was not bound under the statute to take seized propery before a court for a determination on notice as to whether it is in violation of the Act. He claims that it is his practice to seek such determination but he is not required to do so (R. 88, 231). In oral argument before the district court of three judges he stated that on at least one occasion after seeking a judicial determination and stipulating that certain property seized was not gambling equipment and after being ordered by the court to return such property to the claimant he caused its destruction (R. 233).

The challenged statute also appears to offend the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that there does not appear to be any reasonable basis for the classification between manufacturers of parts and subassemblies of slot machines for lawful shipment out of Illinois in interstate and foreign commerce, that are located in a county having

a military establishment of the first class and an identical manufacturer not located in such a county. We do not perceive how the classification has any relationship to the health, morals or safety of the people of either county and it appears to us that such classification is purely discriminatory. See *Morey* v. *Doud*, 354 U.S. 457, 463-466.

The challenged statute is believed to offend the Commerce and Supremacy clauses of the Constitution. No federal court has heretofore passed upon the question whether the Johnson Act, Title 15 U.S.C. §§1171 *et seq.*, has pre-empted state regulation of the manufacture and interstate sale of parts and subassemblies of slot machines, thereby invalidating the challenged statute insofar as it is applied to prevent the manufacture of parts and subassemblies of slot machines for lawful interstate and foreign commerce.

The substantiality of the pre-emption question is demonstrated by the decision of this Court in *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148, 169. The federal statutes there which were held to have pre-empted state action defined processed or renovated butter, fixed the rate of poundage tax upon it, as well as the amount of special tax upon its manufacture, and provided for their collection. The statutes required manufacturers to file such notices and inventories, keep such books, render such returns, post such signs, affix such number to his factory and furnish such bond as the Treasury Department might require. Wholesale dealers were required to keep books and render returns to the same department. Penalties were provided. Specific provisions were made for inspection of the places of manufacture or storage of the materials and the renovated butter itself. Power was given to confiscate the finished product.

Some of these sections are similar to sections of the Johnson Act, Title 15 U.S.C. §§1171, 1173, 1174, 1176, 1177.

Apart from the question of pre-emption there is a substantial question as to whether the challenged statute is invalid as authorizing an unlawful interference with interstate commerce.

"The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the federal Constitution." *Railroad* v. *Husen*, 95 U.S. 465, at 473-474.

If a state cannot ban interstate shipment of all Texas cattle to protect itself from diseased cattle it is a substantial question whether it can ban lawful exportation in interstate and foreign commerce of parts not noxious in themselves to protect itself from the intrastate use of slot machines. The Johnson Act in effect recognizes that parts and subassemblies destined for use in states where their use is lawful and in foreign countries are legitimate subjects of commerce. *Cf. Champion* v. *Ames*, 188 U.S. 321; *Johnson, et al.* v. *Yellow Cab Transit Co.*, 321 U.S. 383, 386; *Pace* v. *Milliken*, 70 F. Supp. 740, 742. As Mr. Chief Justice Fuller said in *Leisy* v. *Hardin*, 135 U.S. 100, at 125:

> "Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations."

The property in question until assembled is not a machine outlawed in Illinois under any statute of Illinois other than the challenged statute and when assembled in Nevada has a lawful use. The use of the police power in this instance has the effect of regulating the morals of the State of Nevada contrary to the declared public policy of that state,

(Nev. Rev. Stat., §§463.10 and 463.20) and has no reasonable relation to the health, morals and safety of the Illinois public.

4. Although contrary to this Court's decisions the court below dismissed the cause for want of jurisdiction, it also found that plaintiff had "many adequate remedies at law". This finding is belied by the facts that (a) the emergency judge after proceedings in accordance with Title 28 U.S.C. §2284(3) found that appellant would be irreparably injured unless a restraining order were issued, (b) the three judge court issued a temporary injunction, (c) the motions to dismiss admitted the specific allegations of irreparable injury to plaintiff's property and business by their threatened destruction, and (d) the answer to the motion to vacate filed by appellees asserted that appellant could apply to a state court of equity to restrain the enforcement of the statute, after the multiplicity of suits mentioned by the court below.

As set forth in the application for injunction presented to Mr. Justice Clark and undenied in appellees' written objections thereto, appellees on April 15, 1959, with knowledge that this appeal would be taken, and immediately following the lifting of the temporary restraining order by the court below for the stated reason of lack of jurisdiction, arrested appellant's president on a warrant issued under the challenged statute and seized more of appellant's property in a search incident to such arrest. Because of these seizures and the constant threat of repeated depredations against its property and business, appellant is unable to operate the business it here seeks to protect.

Judge Perry, the emergency motion judge who issued the temporary restraining order, and Judge Schnackenberg, the Circuit judge who joined in orders restraining the en-

forcement of the challenged statute and dissented from the order denying a temporary restraining order pending appeal to this Court, correctly recognized the district court's jurisdiction and the great and immediate irreparable injury to appellant.

It is no adequate remedy to take a test case through the state courts, and perhaps finally to this Court, while appellant is out of business, its employees laid off and its customers are being lost to its more fortunate competitors. *Toomer v. Witsell*, 334 U.S. 385.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

Hershey Mfg. Co., an Illinois Corporation,
Plaintiff,
vs.
Benjamin S. Adamowski, individually and as State's Attorney of Cook County;
Joseph D. Lohman, individually and as Sheriff of Cook County;
Timothy J. O' Connor, individually and as Commissioner of Police of the City of Chicago;
William G. Milota, individually and as Bailiff of the Municipal Court of the City of Chicago; and
Latham Castle, Attorney General of the State of Illinois,
Defendants.

No. 58 C 1287

Before Schnackenberg, Circuit Judge
Campbell and Hoffman, District Judges

Campbell and Hoffman, District Judges.

MEMORANDUM AND ORDER

Plaintiff has filed this action against the defendants under the provisions of Title 28 U.S.C. Sec. 1331, alleging that the matter in controversy exceeds the sum of Three Thousand ($3000.00) Dollars exclusive of interest and costs and arises under the Constitution, laws and treaties of the United States.

Plaintiff maintains and operates a factory in Chicago, Illinois, and manufactures, among other things, parts and sub-assemblies of gambling devices upon the order of and delivery to customers in interstate and foreign commerce. Plaintiff has also complied with the requirements of the Johnson Act (Title 15 U.S.C. Sec. 11171 *et seq.*) which pertains to the interstate shipment of these devices.

The plaintiff alleges that on, to-wit, June 27, 1958, the defendant Benjamin S. Adamowski, State's Attorney of Cook County, Illinois, acting individually and through officers and agents employed by him and supplied to him and authorized by the other defendants, did seize without warrant or other lawful process, 31 parcels of slot machine sub-assemblies and parts which were the property of the plaintiff from the physical possession and custody of Trans World Airlines, Inc., a corporation, and interstate carrier, licensed by Federal authority, while said property was in the course of interstate commerce from the State of Illinois to the State of Nevada which shipment was in complete compliance with the Johnson Act.

The plaintiff also alleges that Benjamin S. Adamowski and other defendants and their agents, deputies and police officers on June 27, 1958 entered the factory of the plaintiff under the purported authority of a Search Warrant and seized sub-assemblies and parts of slot machines which were possessed and being shipped by the plaintiff in accordance and compliance with the Johnson Act.

The plaintiff further alleges that the seizure of these devices by the defendants was made pursuant to a statute of the State of Illinois entitled "An Act to protect all counties in the State of Illinois in which there are United States Naval Stations, and Military Posts of the first class from slot machines and other gambling devices." (Ill. Rev. Stat. Chap. 38 Sec. 344 *et seq.*) Sec. 344. of this Act provides:

> "That it shall be unlawful for any person, firm or corporation, as owner, agent, or otherwise, to manufacture, sell, lease, or hold, or offer for sale, or lease to another any clock, joker, punch board, tape or slot machine, or any other device upon which money is staked or hazarded, or into which money is paid or played upon chance, or upon the result of the action of which money or valuable thing is staked, bet, hazarded, won or lost, in any county in the State of Illinois, in which there is a United States military post, or United States Naval Training Station of the first class."

Sections 345 and 346 provide for the confiscation and destruction of such devices as well as penalties for the violation of the Act. Section 347 provides that the sale and lease of such devices is unlawful and that proof of non use or disrepair is not a defense to prosecution.

Plaintiff maintains that this statute is invalid and in violation of the 14th Amendment to the Constitution of the United States, alleging that on its face, it is vague and uncertain so that persons affected by it cannot determine in what counties it would apply, nor what conduct would be violative of its provisions. Accordingly the plaintiff has requested the convening of this Three Judge Court praying it to so hold.

Plaintiff also attacks the Statute as an attempt by Illinois to legislate in a field which has been preempted by Congress by enactment of the Johnson Act.

Upon plaintiff's representation of immediate and irreparable loss for which no adequate remedy exists at law, a temporary restraining order was issued by the Emergency Judge on July 28, 1958, and this Three Judge Court convened in accordance with Title 28, U.S.C. Sec. 2281 *et seq.*

Defendants now move to dissolve the restraining order and to dismiss the complaint asserting that the Court does not have original jurisdiction of this matter and that the plaintiff is not entitled to equitable relief.

Whether it is spoken of in terms of "delegated" and "reserved" powers of the United States Constitution or the philosophy of "State's rights", it is a matter of well documented history (See 47 Harv. L. Rev. 795; 41 Harv. L. Rev. 623; 16 Minn. L. Rev. 1) that the predecessors of Sec. 2281 as well as Sec. 2281 were "enacted for the manifest purpose of taking away the power of a single United States Judge . . . to issue an . . . injunction against the execution of a state statute by a state officer . . . on the ground of the Federal unconstitutionality of the statute . . . The wording of the section leaves no doubt that Congress was by provisions *ex industria* seeking to make interference by . . . injunction from a Federal court with the enforcement of state legislation, regularly enacted and in the course of execution, a matter of the adequate hearing and the full deliberation which the presence of three judges . . . was likely to secure. It was to prevent the improvident granting of such injunction by a single judge, and the possible unnecessary conflict between Federal and State authority always to be deprecated." *Cumberland Tel. Co.* v. *Pub. Serv. Comm.*, 260 U.S. 212, 216; *Philips* v. *U. S.*, 312 U.S. 246.

Because of the philosophy underlying Sec. 2281, it is not to be interpreted as a measure of broad social policy to be construed with great liberality, but rather as an enactment technical in the strict sense of the term which must be applied as such. *Philips* v. *U.S., supra.* Therefore, there must be a substantial claim of unconstitutionality of a State statute presented within the complaint before a Three Judge Court will have jurisdiction over a particular cause. *California Water Service Co.* v. *City of Redding*, 304 U.S. 252.

Even if such a substantial claim is presented to the Court, injunctive relief will be precluded for a lack of

equitable grounds if, for example it is seen that plaintiff will not suffer immediate and irreparable harm, *American Federation of Labor* v. *Watson*, 327 U.S. 582; or that plaintiff has an adequate remedy at law, *Toomer* v. *Witsell*, 334 U.S. 385; or that plaintiff has unclean hands, *Durant* v. *Bennett*, 54 F. 2d 634.

We first consider the effect of Federal legislation on the subject matter of gambling devices. The Johnson Act (Title 15 U.S.C. Sections 1171-1177) was passed for the primary purpose of supporting "the policy of those states which outlaw slot machines and similar gambling devices, by prohibiting use of the channels of interstate or foreign commerce for the shipment of such machines or devices into such states." See U.S. Code Congressional Service Vol. 2 (1950) p. 4240.

Section 1171 of this Statute defines a gambling device and specifically includes as such, parts and sub-assemblies of these devices. Section 1172, insofar as material provides as follows:

> "It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or .. possession of the United States from any place outside of such State, the District of Columbia, or possession; *Provided*, that this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provision of this section."

Section 1173 requires manufacturers and dealers in such devices to register with the Attorney General and to file monthly inventories and detailed records of sales and deliveries. Section 1174 requires that shipping containers be plainly marked to show what they are and the names and

addresses of the consignees. Sections 1176 and 1177 provide criminal penalties for violators and for the seizure and forfeiture of their gambling devices or parts thereof.

Assuming that the Johnson Act does pre-empt interstate shipment of gambling devices, this phase of the case is clearly not cognizable by this Three Judge Court for many reasons. First, some of the slot machine sub-assemblies and parts are alleged to have been seized from the possession of Trans World Airlines, Inc., without warrant or other lawful process by officials of the State of Illinois. This is an attack upon the exercise of authority in a particular case and is not an attack upon the constitutionality of a statute. *Phillips* v. *United States, supra,* at pages 252, 253. Jurisdiction is therefore lacking in this Three Judge Court since this does not constitute a suit against the State but comes within the recognized Federal jurisdiction over persons purporting to act as officers of the State and, in the course thereof, to deprive citizens of rights granted to them by the Federal Constitution and laws. *Ex Parte Bransford,* 310 U.S. 354, 361; *Cloverleaf Butter Co.* v. *Patterson,* 116 F. 2d 227. This phase of the pending suit might properly be one for a single district judge under the Johnson Act involving merely an alleged interference with interstate commerce, properly enjoinable if proved. It is clearly not one cognizable by this Court. *Phillips* v. *U.S., supra; Cloverleaf Butter Co.* v. *Patterson, supra.* So much for that part of defendant's motion relating to the seizure herein of articles alleged to be lawfully moving in interstate commerce.

As to the remainder of the seizure comprising similar articles taken at plaintiff's plant allegedly under the authority of the Illinois Statute the *constitutionality* of which is challenged by the complaint, the defendants in support of their motion to dismiss have asserted other Illinois

Statutes under which they claim to have acted, the constitutionality of which is not and they say, cannot be challenged. Ill. Rev. Stat. Chap. 38, Sections 341-343. Section 342 defining gambling devices has been construed by the Supreme Court of Illinois in *People* v. *One Device*, 410 Ill. 318. There, the court held that gambling devices as defined in Sec. 342 are not lawful subjects of property which the law protects but have ceased to be regarded or treated as property and are at all times liable to seizure, forfeiture and destruction without violating any constitutional provisions. That the seizure of such devices would not violate the due process clause is sustained by *Lawton* v. *Steele*, 152 U.S. 133; *Durant* v. *Bennet*, 54 F. 2d 634.

There is no way for this court properly to determine this phase of the case by an interpretation of the one Statute challenged in the complaint. This interpretation under both Federal and State Constitutions as well as the determination of which Illinois Statute properly applies and the determination of the many factual issues presented, all belong to the Illinois courts. *Watson* v. *Buck*, 313 U.S. 387, 401. This court cannot assume jurisdiction of this case because the single statute challenged in this complaint may seem to violate the due process clause of the 14th Amendment of the United States Constitution. The Illinois Supreme Court has not yet so interpreted it and, in any event, the police power of a state would allow the confiscation of gambling equipment without violation of the due process clause under the theory that such devices are no longer lawful property. *Lawton* v. *Steele*, *People* v. *One Device*, *Supra.*

The doctrine of "discretionary abstention" so frequently urged upon us by the Supreme Court in its construction of Section 2281, should be exercised here by the dismissal of a complaint which asks a decision on the merits concerning unresolved questions of State law and questions of

Constitutional law never before decided by the State Supreme Court. Plaintiff has not presented in its complaint a substantial Constitutional claim in regard to the one Statute challenged. Therefore, this Three Judge Court is without jurisdiction of this cause. To assume jurisdiction under the facts as presented in the complaint would be an abuse of Sec. 2281.

Furthermore, even if this Court has jurisdiction of the cause, plaintiff is not properly in equity since no immediate and irreparable harm will occur to the plaintiff if this court does not proceed. *Douglas* v. *Jeanette*, 319 U.S. 157. Before the property in question can be destroyed, it must under Illinois law be brought before a "judge, justice or court" which will make a determination as to the disposition of such property at which time the Constitutionality of the Statute may be raised. Ill. Rev. Stat. Chap. 38, Sec. 697. Even if the property were destroyed unlawfully the harm would not be irreparable since an action for damages would lie and gambling devices are not so unique that they cannot be replaced.

Plaintiff has many adequate remedies at law either under Sec. 697 *supra*, at which time the constitutionality of the Statute may be raised, or by way of replevin in which it may raise the same question, or by way of declaratory judgment under the Illinois Civil Practice Act, Sec. 57.1 (Ill. Rev. Stat. Chap. 110 Sec. 57.1), or by way of damages if the property were destroyed unlawfully.

For these reasons, the motion to dismiss is hereby granted, the temporary restraining order is dissolved and the cause is dismissed at plaintiff's costs

/s/ WILLIAM J. CAMPBELL
/s/ JULIUS J. HOFFMAN
Judges, United States District Court
for the Northern District of Illinois

February 9, 1959

SCHNACKENBERG, Circuit Judge, dissenting.

The district judge to whom this case was originally assigned requested the chief judge of the United States Court of Appeals for the Seventh Circuit, to designate, pursuant to 28 U.S.C.A. §2284, a three-judge court, to hear and determine this action. Such a three-judge court was appointed and is now acting. It has heard arguments on motions filed by defendants to dismiss the proceeding.

Plaintiff's complaint is based in part, upon a contention that §344, *et seq.* ch. 38, R.S. Ill., relied on by defendants, is unconstitutional in that it violates the constitution of the United States.

The motion to dismiss filed by Latham Castle, attorney general for the state of Illinois, states as a ground therefor: "Notwithstanding the arguments and protestations of the Plaintiff the statute assailed, to wit:

> 'An act to protect all counties in the State of Illinois in which our United States naval stations and military posts of the first class from slot machines and other gambling devices' (Par. 344, *et seq.*, Ch. 38 Ill. Rev. Stats. 1957)

is constitutional and valid in all its aspects and does not contravene any of the provisions of the Constitution of the United States * * *."[1]

This three-judge court must continue to perform its functions in this case until it disposes of the contention of plaintiff that said Illinois act relied upon by defendants as a justification for their seizure of plaintiff's property, is

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[1] The motion to dismiss filed by the state's attorney of Cook County, Illinois, states "Inasmuch as the complaint prays for a determination of unconstitutionality of an Illinois statute, applications should have been made for a three-judge court in accordance with the provisions of 28 U.S.C.A., Secs. 2281-2284 inclusive."

violative of plaintiff's federal constitutional rights. Both the attorney general of the state of Illinois and the state's attorney of Cook County, Illinois, in their motions aforesaid, recognize that this is the proper procedure.

As to the language of the majority opinion to the effect that an interpretation of the Illinois statute belongs to the Illinois courts, undoubtedly the language of the United States Supreme Court, in *Doud* v. *Hodge*, 350 U.S. 485, has been overlooked:

> "It is clear that the District Court had jurisdiction to entertain appellants' complaint by virtue of the authority vested in it by 28 U.S.C. §§ 2281 and 2284. This Court has never held that a district court is without jurisdiction to entertain a prayer for an injunction restraining the enforcement of a state statute on grounds of alleged repugnancy to the Federal Constitution simply because the state courts had not yet rendered a clear or definitive decision as to the meaning or federal constitutionality of the statute."

/s/ ELMER J. SCHNACKENBERG

APPENDIX B

Chap. 38 Ill. Rev. Stat., par. 344 et seq.

AN ACT to protect all counties in the State of Illinois in which there are United States naval stations, and military posts of the first class from slot machine and other gambling devices. [Filed July 11, 1919. L. 1919, p. 689.]

344. SLOT MACHINES IN COUNTIES WHERE ARMY POST.] § 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*: That it shall be unlawful for any person, firm or corporation, as owner, agent or otherwise, to manufacture, sell, lease, or hold, or offer for sale, or lease to another any clock, joker, punch board, tape or slot machine, or any other device upon which money is staked or hazarded, or into which money is paid or played upon chance, or upon the result of the action of which money or valuable thing is staked, bet, hazarded, won or lost, in any county in the State of Illinois in which there is a United States military post, or United States naval training station of the first class.

345. MACHINE MAY BE DESTROYED.] § 2. Every such machine described in this Act is hereby declared a gambling device, and shall be subject to seizure, confiscation and destruction by any municipal, or other local authority, within whose jurisdiction the same may be found.

346. PENALTY.] § 3. Any person, firm or corporation, who, by himself or another his principal, agent or otherwise, shall violate the provisions of this Act, shall be fined for the first offense not less than $100.00, and shall be imprisoned for thirty days in the county jail, and for the second offense not less than $500.00, and shall be confined in the county jail not less than six months, and for each subsequent offense shall be fined not less than $500.00 and imprisoned in the penitentiary for one year.

347. SALE—LEASE—WHAT NOT DEFENSE.] § 4. It shall be unlawful to bargain for the sale or lease of any gambling machine described in this Act, or to collect money, or to take compensation for such sale, or lease, or to take or accept money from any person, or from any such machine as a share or royalty, or compensation for any such lease, or sale. Proof that such machine or device when seized has not been used, or is out of repair, shall not constitute a defense to a prosecution under this Act.

348. NUISANCE.] § 5. All places where slot machines and other gambling devices are held or operated shall be taken and declared to be common and public nuisances, and whosoever shall keep any such place by himself or his agents or servant, shall, for each offense, be fined not less than $100.00, and shall be confined in the county jail for thirty days, and for each subsequent offense shall be fined $500.00 and confined in the county jail for six months.

EXCEPTION.] Vending machines by which full and adequate return is made for the money invested and in which there is no element of chance or hazard shall not fall under the provisions of this Act.

15 U S C § 1171 et seq.:

§1171. DEFINITIONS

As used in this chapter—

(a) The term "gambling device" means—

(1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device.

(b) The term "State" includes Alaska, Hawaii, Puerto Rico, the Virgin Islands, and Guam.

(c) The term "possession of the United States" means any possession of the United States which is not named in subsection (b) of this section. Jan. 2, 1951, c. 1194, § 1, 64 Stat. 1134.

§ 1172. TRANSPORTATION OF GAMBLING DEVICES AS UNLAWFUL; EXCEPTIONS; AUTHORITY OF FEDERAL TRADE COMMISSION

It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession: *Provided*, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section.

Nothing in this chapter shall be construed to interfere with or reduce the authority, or the existing interpretations of the authority, of the Federal Trade Commission under the Federal Trade Commission Act. Jan. 2, 1951, c. 1194, § 2, 64 Stat. 1134.

§ 1173. REGISTRATION OF MANUFACTURERS AND DEALERS; FILING OF INVENTORY AND SALES AND DELIVERY RECORDS MONTHLY; SALES OF UNASSEMBLED DEVICES; ILLEGAL SALES OR DELIVERIES

Upon first engaging in business, and thereafter on or before the 1st day of July of each year, every manufacturer of and dealer in gambling devices shall register with the Attorney General his name or trade name, the address of his principal place of business, and the addresses of his places of business in such district. On or before the last day of each month every manufacturer of and dealer in gambling devices shall file with the Attorney General an inventory and record of all sales and deliveries of gambling devices as of the close of the preceding calendar month for the place or places of business in the district. The monthly record of sales and deliveries of such gambling devices shall show the mark and number identifying each article together with the name and address of the buyer or consignee thereof and the name and address of the carrier. Duplicate bills or invoices, if complete in the foregoing respects, may be used in filing the record of sales and deliveries. For the purposes of this chapter, every manufacturer or dealer shall mark and number each gambling device so that it is individually identifiable. In cases of sale, delivery, or shipment of gambling devices in unassembled form, the manufacturer or dealer shall separately mark and number the components of each gambling device with a common mark and number as if it were an assembled gambling device. It shall be unlawful for any manufacturer or dealer to sell, deliver, or ship any gambling device which is not marked and numbered for identification as herein provided; and it shall be unlawful for any manufacturer or dealer to manufacture, recondition, repair, sell, deliver, or ship any gambling device without

having registered as required by this section, or with-filing monthly the required inventories and records of sales and deliveries. Jan. 2, 1951, c. 1194, §3, 64 Stat. 1135.

§ 1174. LABELING AND MARKING OF SHIPPING PACKAGES

All gambling devices, and all packages containing any such, when shipped or transported shall be plainly and clearly labeled or marked so that the name and address of the shipper and of the consignee, and the nature of the article or the contents of the packages may be readily ascertained on an inspection of the outside of the article or package. Jan. 2, 1951, c. 1194, § 4, 64 Stat. 1135.

§ 1175. SPECIFIC JURISDICTIONS WITHIN WHICH MANUFACTURING, REPAIRING, SELLING, POSSESSING, ETC., PROHIBITED

It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of Title 18 or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of Title 18. Jan. 2, 1951, c. 1194, § 5, 64 Stat. 1135.

§ 1176. PENALTIES

Whoever violates any of the provisions of sections 1172-1174 or 1175 of this title shall be fined not more than $5,000 or imprisoned not more than two years, or both. Jan. 2, 1951, c. 1194, § 6, 64 Stat. 1135.

§ 1177. CONFISCATION OF GAMBLING DEVICES AND MEANS OF TRANSPORTATION; LAWS GOVERNING

Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this chapter shall be seized and forfeited to the United

States. All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this chapter, insofar as applicable and not inconsistent with the provisions hereof: *Provided,* That such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of gambling devices under this chapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General. Jan. 2, 1951, c. 1194, § 7, 64 Stat. 1135.

Title 28 U.S.C. § 1331

§ 1331. FEDERAL QUESTION; AMOUNT IN CONTROVERSY

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Title 28 U.S.C. § 2281

§ 2281. INJUNCTION AGAINST ENFORCEMENT OF STATE STATUTE; THREE-JUDGE COURT REQUIRED

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by

restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.